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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1330

K. O. SIBLEY, ET AL
Petitioners

versus

RURAL ELECTRIFICATION ADMINISTRATION, ET AL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 16, 1970

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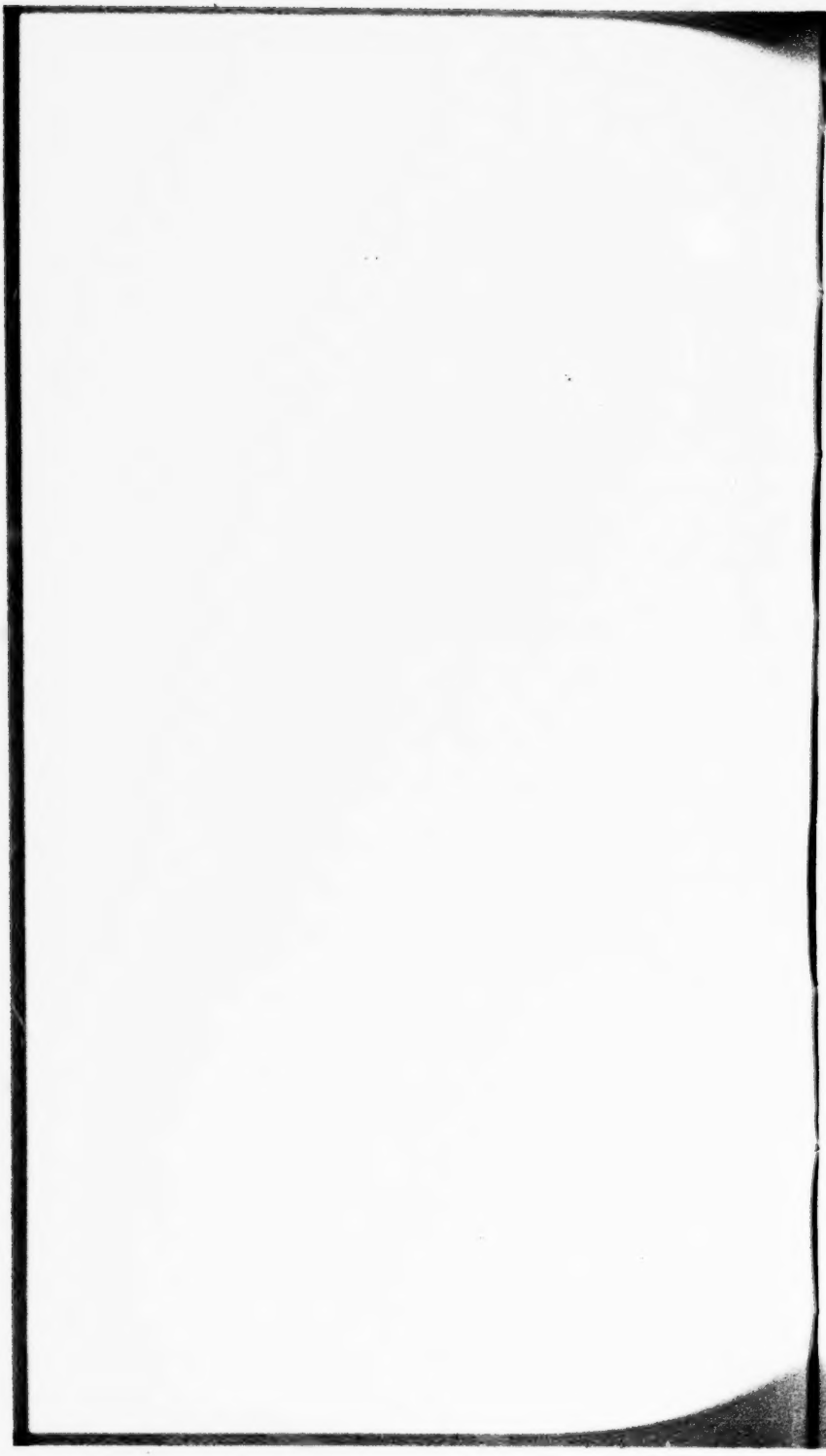

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PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, K. O. Sibley and 14 other members of Dixie Electric Membership Corporation, suing on behalf of Dixie Electric Membership Corporation and on behalf of its subsidiary corporation, Louisiana Electric Cooperative, Inc., and on behalf of all other members of Dixie Electric Membership Corporation, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above entitled case on November 19, 1969.

OPINIONS BELOW

The opinion of the district court which has not been reported is in the record (R. 224) and is appended hereto. (Appendix B, infra, p. 24). The opinion of the Court of Appeal is reported at 419 F. 2d 384 and is appended hereto with its order denying petitioners' motion for rehearing. (Appendix B, infra. p. 23).

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1969. Application for rehearing was filed on November 24, 1969, and rehearing was denied on December 18, 1969. (Appendix B, infra. p. 24). The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Does the Federal District Court have jurisdiction to review the actions of an administrative official which were allegedly carried out in violation of an act of Congress and an administrative regulation which he was bound to follow?

2. Do members of a corporate entity have legal standing to bring a derivative action on behalf of the corporation seeking to have illegal action and invalid contracts entered into by the corporation set aside, or to prevent its assets from being wasted?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provision involved is Article 3, Sec. 2, of the United States Constitution. The statutes involved are

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Secs. 4 and 13 of the Rural Electrification Act of 1936, as amended, 7 U.S.C. 904, 913; Sec. 1 of the Sherman Antitrust Act, as amended, 15 U.S.C. 1; Sec. 10 of the Administrative Procedure Act, 5 U.S.C. 1009; Sec. 3 of the Clayton Act, 15 U.S.C. 14; Article 19, Sec. 14, as amended, Louisiana Constitution of 1921; La. R.S. 51:122-124. The regulation involved is REA Bulletin 111-3, 29 Fed. Reg. 2765 (1964). They are printed at Appendix A, infra, p. 10.

STATEMENT OF THE CASE

1. Jurisdiction in the District Court

This action was filed in the district court by K. O. Sibley and other consumer-members of Dixie Electric Membership Corporation against the Rural Electrification Administration, its Administrator, the United States Department of Agriculture and its Secretary, Dixie Electric Membership Corporation and Louisiana Electric Cooperative, Inc. The matter in controversy exceeds $10,000 in value, and the case arises under the Constitution and laws of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. 1331 and 28 U.S.C. 1361.

2. Proceedings in the Court Below and Facts Material to the Questions Presented.

This is a suit to have a contract declared invalid. The contract is a loan agreement between the cooperatives and the Rural Electrification Administration. The derivative action brought by plaintiffs on behalf of the cooperative of which they are members challenges (a) the legality of a $56,521,000 loan applied for and obtained by Louisiana Electric Coopera-

tive, Inc., under the Rural Electrification Act (7 U.S.C. 904) and administrative regulations promulgated thereunder (R.E.A. Bulletin 111-3), and (b) the validity of power contracts between Dixie Electric and Louisiana Electric which were required by the Administrator as security for the loan to Louisiana Electric Cooperativefi Inc., and contend (c) that the whole arrangement amounts to a improvident business venture which is detrimental to Dixie Electric; results in a waste of its assets, and is one which serves interests other than those of the distribution borrower.

The status of the plaintiffs as members of the cooperative on whose behalf the derivative action is brought was not challenged. Their right to represent the organization was conceded. (R. 101.)

The loan agreement under attack provides for the loan of $56,521,000 to Louisiana Electric for construction of a generation and transmission system. (R. 53, 54) It is alleged, and there is evidence to establish, that the effectiveness of the system to be constructed depends upon a contractual arrangement with private industry and municipalities (R. 19, 55) and that the loan is secured in whole or in part by an obligation of Dixie Electric and the other member cooperatives to purchase all of their electrical requirements from Louisiana Electric for a period of at least 35 years. (R. 7)

It is alleged, and there is evidence to establish, that the 35-year exclusive dealing contract will not provide power to Dixie Electric as cheaply as it is available from other sources, and that the reliability of service is subject to serious question. (R. 143-149)

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Preliminary injunction applied for in the district court was denied and motion to dismiss on the grounds that the court lacked jurisdiction over the subject matter of the suit and that the petitioners did not have standing to sue, were filed by respondents. The motion to dismiss was maintained and petitioners appealed to the Fifth Circuit.

The Fifth Circuit maintained the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. The holding below that the contracts of the Administrator of the Rural Electrification Administration and his loan approval authority are not reviewable by the courts conflicts with the principles established by the decisions of this court in *Barlow v. Collins*, No. 249 October Term 1969, 38 L.W. 4195, and *Association of Data Processing Service Organizations, Inc. v. Camp, Comptroller of the Currency*, 85 October Term 1969, 38 L.W. 4193.

The Fifth Circuit concluded its opinion in *Barlow v. Collins*, saying:

> "As we concluded in REA v. Central La. Elec. Co., supra at 865, this case is one where however outrageous or unfair appellants consider the effects of this regulation, their remedy lies not in the Court but in Congress." 398 F. 2d 398, at p. 402 (1968).

In reversing, this court reaffirmed with force and clarity the principle that judicial review is favored and will be accorded to persons aggrieved in the absence of "clear and convincing evidence of a contrary legislative intent."

Where there is clear congressional intent to benefit or protect the interest of a class, this court's holding in *Barlow v. Collins* indicates that members of that class may have judicial review unless the command of the statute precludes such review. The Rural Electrification Act does not expressly preclude review and there can be no question that Congress conferred the benefit of that Act upon Rural Electric Cooperatives and their consumer-members. The power supply survey required under REA Bulletin 111-3, and which petitioners contend was not conducted as a condition precedent to the making of the loan here, has as its principal function the institution of advantageous power supply contracts for Rural Electric Cooperatives.

This is a case where the objectives of the statute will be denied the beneficiaries thereof unless the right to judicial review is recognized to exist.

2. The decision of the court below denying standing to petitioners is in direct conflict with the decision of this court in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, and is contrary to principles set forth in *Barlow v. Collins*, supra and *Association of Data Processing Service Organizations, Inc. v. Camp, Comptroller of the Currency*, supra.

In *Ashwander*, the standing of preferred shareholders to bring a derivative action contesting the legality of a contract between the corporation in which they held shares and the Tennessee Valley Authority was recognized.

The standing of the member-consumers here to contest legality of a contract between the cooperative which they represent and another government agency was denied by the

court below. The status of the parties is the same and the situation here may well be identical to that which prompted the remark of the court in *Ashwander* that:

> "Thus, the breach of duty may consist in yielding, without appropriate resistance, to governmental demands which are without warrant of law or are in violation of constitutional restrictions." 297 U.S. at 318.

In *Barlow v. Collins* and *Association of Data Processing Service Organizations, Inc. v. Camp*, "standing to sue" was brought back into the context of Article 3 of the Constitution. In doing so, this court established as requisites to standing: (1) injury in fact; (2) a "case and controversy" subject to being presented in an adversary context and in a form historically viewed as entitled to judicial resolution; and (3) a protectible interest under the relevant statute. Petitioners here meet all three tests. Their allegations, which are supported by evidence, show economic injury. The action is one to test the validity of a contract; and is in an adversary context; and in a form susceptible of judicial resolution. The Rural Electrification Act, the relevant statute, was enacted as an expression of Congressional intent to benefit and protect consumer-members and their electrical cooperatives.

Petitioners here clearly fall within the principle which ordained that the tenant farmers in *Barlow v. Collins* had a protectible interest.

3. A review of the questions presented is of vital importance to the beneficiaries of the Rural Electrification Act and the administration of that statute in accordance with the objectives of Congress.

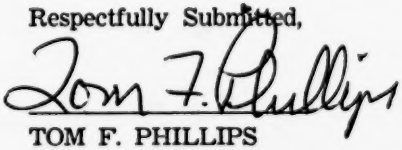
Immunity from judicial review gives rise to administrative absolutism. Administrative absolutism tends to spawn bureaucratic autocracy which is encouraged to operate without regard to the objectives of Congress and the interest of the affected public. A statement by a court that "regardless of how outrageous or unfair the making of this loan may seem, the remedy is not in the courts but in the Congress" is totally inconsonant with the rationale of *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 135, which is expressed in the following language:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.
>
> • • •
>
> "The government of the United States has been emphatically termed as a government of laws and not men. It will cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." (2 L. Ed. at p. 162)

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and the judgment of the court below should be reversed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Tom F. Phillips, one of the attorneys for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of March, 1970, I served copies of this petition for certiorari on the respondents named therein by depositing the same in the United States Post Office, with airmail postage prepaid, addressed to the following parties:

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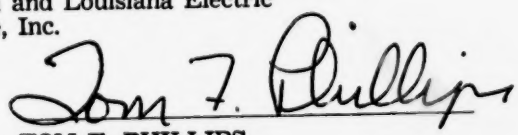

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APPENDIX A

U.S. Const. Article 3, Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTIONS 4 AND 13 OF THE RURAL ELECTRIFICATION ACTS OF 1936, AS AMENDED:

4. The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural

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electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 903(d) and 903(e) of this title but without regard to the 25 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended: *Provided*, That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income: *Provided, further*, That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and

unpaid balance of any loans made pursuant to this section prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: *And provided further*, That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed. May 20, 1936, c. 432, Title I, § 4, 49 Stat. 1365; Sept. 21, 1944, c. 412, Title V, §§ 502(a), 503, 58 Stat. 739; Dec. 23, 1944, c. 725, 58 Stat. 925; June 29, 1948, c. 703, 62 Stat. 1070; Oct. 28, 1949, c. 776, §§ 2, 4(e), 63 Stat. 948; June 15, 1955, c. 139, § 2, 69 Stat. 132; 7 U.S.C. 904.

13. As used in this chapter the term "rural area" shall be deemed to mean any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof; the term "farm" shall be deemed to mean a farm as defined in the publications of the Bureau of the Census; the term "person" shall be deemed to mean any natural person, firm, corporation, or association; the term "Territory" shall be deemed to include any insular possession of the United States. May 20, 1936, c. 432, Title I § 13, 49 Stat. 1367; Oct. 28, 1949, c. 776, § 2, 63 Stat. 948; 7 U.S.C. 913.

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SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise ex-

pressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statu-

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tory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243; 5 U.S.C. 1009.

SECTION 1 OF THE SHERMAN ANTITRUST ACT, AS AMENDED:

Every contract, combination in the form or trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in section 1-7 of this title shall render illegal contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall

not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; 15 U.S.C. 1.

SECTION 3 OF THE CLAYTON ACT:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract

for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731; 15 U.S.C. 14.

LA. R.S. 51:122:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal.

Whoever violates this Section shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, not more than three years, or both.

LA. R.S. 51:123:

No person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state.

Whoever violates this section shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, not more than three years, or both.

LA R.S. 51:124:

No person engaged in commerce shall, in the course of such commerce, lease, sell, or contract for the sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within this state, or fix a price, discount, or rebate on the condition, agreement, or understanding that the purchaser or lessee shall not use or deal in the goods, wares, mer-

chandise, machinery, or other commodities of a competitor of the vendor or lessor, where the effect of the sale, contract for sale, or lease, or the condition, agreement, or understanding is to substantially lessen competition or tends to create a monopoly in any line of commerce.

REA BULLETIN 111-3. 29 FED. REG. 2765 (1964):

UNITED STATES DEPARTMENT OF AGRICULTURE

Rural Electrification Administration

February 24, 1964

REA BULLETIN 111-3

SUBJECT: Power Supply Surveys

I. **Purpose:** This bulletin sets forth REA policy with regard to power supply surveys and certifications thereto by the Administrator in relation to the approval of loans for generation or transmission facilities.

II. **General:** The terms and conditions of power supply arrangements are major and critical factors in the ability of REA borrowers to carry forward the rural electrification program. REA has the responsibility to assist borrowers in achieving the most advantageous power supply arrangements to accomplish the objectives of the Rural Electrification Act and, without prejudice to the accomplishment of these objectives to conserve REA loan funds. REA will undertake power supply surveys to assure adequate review of existing and proposed power supply alternatives and to encourage closer cooperation between REA borrowers and other electric power suppliers.

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III. **Policy:**

A. **Requests for Power Supply Surveys:** Any REA borrower or potential borrower may request REA to make a survey of any specific power supply problem or its power supply needs. Such request shall provide a full description of existing power supply contracts and arrangements, a statement of any special problems and a general summary of power supply needs, copies of any proposals made by existing or other suppliers, and a summary of negotiations pertaining to current or anticipated problems and needs. Distribution-type systems should submit such request and information to the area office; power-type systems should submit such request and information to the Power Supply Division.

B. **Conduct of Survey:** If the Administrator determines to undertake the requested power supply survey, the survey shall be so conducted as to provide an adequate review of the applicant's power supply problems and needs, existing or proposed power supply arrangements, if any, and such other potential power supply arrangements which, in the judgment of the Administrator, may contribute to the solution of those problems and needs. Where the Administrator finds existing or proposed contracts with power suppliers are unreasonable for purposes of the Rural Electrification Act, the supplier under such contracts or proposals will be advised wherein they are unreasonable, and REA will endeavor to have the contracts or proposals made reasonable. The REA borrower or potential borrower shall be made a party to any negotiations between REA and such power supplier. When necessary to avoid dilatory tactics or protracted delays, the Administrator shall advise the parties in such cases of a definite time limit for negotiations

under the survey and a final cut-off date for all proposals which are to be considered in evaluation of loan applications related to the problems and needs covered by the survey.

C. **Requirement for Consideration of Loan Application:** No loans for generation or transmission facilities will be made until a power supply survey has been completed by REA. No application for financing of generation or transmission facilities requiring a loan for either or both in an amount of more than $2 million will be accepted for consideration by REA unless (a) a power supply survey has been completed, or (b) it is determined by the Administrator that completion of the survey requires full review of proposed REA-financed generation or transmission facilities.

D. **Certification of Loans for Generation or Transmission:** No loan for generation or transmission facilities will be made except in compliance with Bulletin 20-6, "Loans for Generation and Transmission," dated May 31, 1961, and upon certification by the Administrator to the Secretary of Agriculture that the loan has been approved after the completion of a power supply survey which shows that the loan is (a) needed to construct facilities to implement an existing contract or a proposed contract with the existing power supplier; or (b) needed to provide facilities or service for which there is no existing or proposed contract from any other power supplier; or (c) needed because existing and proposed contracts to provide the facilities or service to be financed were found to be unreasonable, each supplier involved was so advised, REA attempted to have such contracts made reasonable, and the existing or other proposed suppliers had failed or refused to do so within the time set by the Administrator. Loans for generation or transmission facilities

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of more than $2 million shall be similarly certified to the Comptroller General. They shall also be certified to the Senate and the House of Representatives of the United States, as directed by the respective bodies. Certification of each generation or transmission loan in excess of $2 million shall be accompanied by the following information:

1. The name and address of the applicant borrower and the date of the application.

2. Description and estimated cost of the proposed generation facilities. Indicate if the proposed facilities are the initial or additional unit or units of a plant comprised of one or more units.

3. Description and estimated cost of proposed transmission facilities, including any immediate or future plans to interconnect with other transmission systems.

4. Description of any long-range plans the applicant may have for construction of additional generation and transmission facilities and the estimated cost of the planned facilities.

5. Comparison of the estimated costs of generation by the applicant borrower with the cost of power available from existing supplies, including the final offer by the private supplier including terms and conditions he offered to meet applicant's long-term energy needs.

6. Summary of the efforts made by the applicant and by REA to obtain the applicant's power and energy requirements from existing power suppliers and the reason why such efforts have not been successful.

7. Explanation of the applicant's reasons for seeking an REA loan.

8. The amount of electric energy which the applicant will cease to purchase from present power suppliers upon construction of the generating plant for which REA financing is being sought.

9. Explanation of the extent to which the feasibility of the requested loan for generation and transmission facilities depends upon the use of a portion of the facilities by others (including Federal power marketing agencies).

10. Details of the applicant's plans to sell or otherwise make available any of the power and energy from the proposed generation facilities to others (including Federal power marketing agencies).

11. Names of State agencies and commissions having jurisdiction over the applicant borrowers.

Norman M. Clapp
Administrator

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APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(November 10, 1969)

Before THORNBERRY, MORGAN and CARSWELL, Circuit Judges.

PER CURIAM:

This is the third attempt to enjoin the consummation of a Rural Electrification Administration Loan to the Louisiana Electric Cooperative. See Rural Electrification Administration v. Central Louisiana Electric Co., 354 F.2d 859 (5th Cir. 1966), certiorari denied 385 U.S. 815, 87 S.Ct. 34, 17 L.Ed.2d 54.

[1] Despite this Court's previous explicit holding that private power companies themselves cannot enjoin as competitors the granting of a loan from the Rural Electrification Administration, appellants here seek to bar the loan as individual members of Louisiana Electric Cooperative, Inc., which is itself the beneficiary of the subject loan.

[2] The effect of our holding in Rural Electrification Administration v. Central Louisiana Electric Co., supra, cannot be so easily circumvented. There the Court specifically held that apart from the plaintiff's lack of standing, the Courts are without jurisdiction to review the Agency's loan-making authority. The holding has been reiterated in Alabama Power Co. v. Alabama Electric Co-operative, Inc., 394 F.2d 672 (5th

Cir. 1968), certiorari denied 393 U.S. 1000, 89 S.Ct. 488, 21 L.Ed.2d 465.

The district court's order of dismissal is accordingly

Affirmed.

OPINION OF DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA, DISMISSING COMPLAINT

HUNTER, JUDGE:

ON MOTION FOR REHEARING

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING MOTION FOR REHEARING

December 18, 1969

Before THORNBERRY and MORGAN, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM:

The appellant's motion for rehearing filed in the above styled and numbered cause is hereby

DENIED.

DISTRICT COURT RULING ON MOTION TO DISMISS

This is the third of a series of suits to enjoin the consummation of a $56,000,000 loan by the Rural Electrification Administration to Louisiana Electric Cooperative, Inc. The first was filed in October of 1964. There, certain power com-

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panies sought to annul the loan and to enjoin consummation of it, claiming, among other things, that it violated the purposes of the Rural Electrification Administration, REA Bulletin 111-3, and complainants' constitutional rights, and that the Administrator had incorrectly certified that no state agency or commission had jurisdiction over LEC within the requirement of 7 U.S.C.A. 904 requiring prior approval of loans by agencies or commissions having such jurisdiction. As reflected in the decision of the United States Fifth Circuit Court of Appeals, *Rural Electrification Administration v. Central Louisiana Electric Company*, 354 F. 2d 859 (1966) cert. denied, 385 U.S. 815, 838, Honorable Ben C. Dawkins, Jr. issued the injunction sought by complainant. In reversing, the Fifth Circuit held that federal courts do not have jurisdiction to review the grant or denial of loans by the Rural Electrification Administration, and that the power companies lacked standing to maintain the action.

In October of 1968 the same parties filed proceedings in Suit No. 14164 on the docket of this Court again seeking to enjoin consummation of the loan. Following a hearing on the application for a preliminary injunction, Judge Dawkins took the matter under advisement. On December 12, 1968, on application of the complaining parties, Judge Dawkins issued a temporary restraining order prohibiting release by REA of loan funds to LEC. The defendants sought relief from the United States Fifth Circuit Court of Appeals staying that order, or alternatively, for issuance of a writ of prohibition and/or mandamus having the same effect. On December 23, 1968, the Court of Appeals acted on the application after noting expiration of the order that day, and stated:

"Granting of a further temporary restraining order

by the District Court would, in our view, be improvident, since no immediate irreparable harm and damage has been made out by plaintiff. * * *"

Subsequently, on December 31, 1968, fourteen members of Dixie Electric Membership Corporation filed the instant proceeding, seeking to enjoin the REA loan on the same basis as had been contended for by the power companies in the two prior actions, Nos. 10552 and 14164. It is also contended that certain 35-year requirement contracts between Dixie and LEC for the purchase by Dixie of power from LES violate the anti-trust laws, and that certain contracts entered by LEC and others in furtherance of the realization of the LEC system were disadvantageous and damaging to Dixie and LEC. The petitioners are 14 of the 20,000 members of Dixie Electric. Judge Dawkins recused himself and the case was promptly referred to and heard by this Court.

In *Alabama Power Company v. Alabama Electric Cooperative*, 394 F. 2d 674 (C.A. 5, 1968), the Fifth Circuit held certain contracts between Alabama Electric Cooperative and distribution cooperatives to be within the statutory authority of the REA Administrator. The Court's analysis of the Administrator's authority, and its language in upholding the contract, is as applicable to the attack by plaintiffs here as it was in *Alabama Power*:

"* * * This is the first of the attacks by private companies on federal loans to competitors in which there has been a separate attack on the borrower and those alleged to be in conspiracy with it for claimed violation of the anti-trust laws. It is argued that there is nothing in the Act or in its legislative history which authorized the

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Administration to grant immunity to the borrower, AEC, and that at the very least the plaintiff has a right to pursue its anti-trust suit against AEC. That position, we think, is based upon too narrow a conception of the program authorized by Congress. The making of loans by the Administrator necessarily includes the existence and ability of borrowers to whom such loans can be made. If the security which the Administrator requires can be undercut and the borrower mulcted in treble damages for complying with the condition imposed by the Administrator for making the loan, then the functioning of the Act will be crippled, if not defeated. To avoid frustrating the intent of Congress, it must follow that in cases where the Administrator is immune from suit under the anti-trust laws, the borrower is likewise immune."

REA's insistence on 35-year all-requirement contracts as security for REA loans has been brought to the attention of Congress by REA.[1] Yet Congress has continued to make appropriations without the slightest indication of Congressional dissatisfaction with REA's imposition of 35-year all-requirement contracts.

Being of the opinion that plaintiffs could not ultimately prevail in the face of decisive appellate authority, we did on January 22, 1969, deny the request for a preliminary injunction. On the basis of that same authority, we sustain defendants' motions to dismiss.

Counsel for defendants should submit appropriate order.

---

[1] See, for example, Hearings Before Agricultural Sub-committee, Department of Agriculture Appropriations for 1951, Senate Committee on Appropriations, 81st Congress.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 25th day of February, 1969.

/s/ Edwin F. Hunter, Jr.
UNITED STATES DISTRICT JUDGE

Filed
February 26, 1969

ORDER OF DISMISSAL

Defendants, having moved the Court to dismiss the within action, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on grounds of judicial non-reviewability and because plaintiffs lack standing to maintain this suit, and the parties having agreed to submit said motion on the briefs already on file with the Court, and the Court being fully advised in the premises, it is;

ORDERED, That the Motions to Dismiss be and hereby are granted dismissing this action because there is no judicial review of the subject matter herein, and because plaintiffs lack standing to maintain this suit.

DATED: March 17, 1969.

Filed
March 18, 1969

/s/ Edwin F. Hunter, Jr.
UNITED STATES DISTRICT JUDGE

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1330

K. O. SIBLEY, ET AL., PETITIONERS

v.

RURAL ELECTRIFICATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RURAL ELECTRIFICATION ADMINISTRATION IN OPPOSITION

OPINION BELOW

The opinion and order of the district court (Pet. App. 24–28) are not reported. The opinion of the court of appeals (Pet. App. 23–24) is reported at 419 F. 2d 384.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1969. A timely petition for rehearing was denied on December 18, 1969. The petition for a writ of certiorari was filed on March 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

385-354—70

QUESTION PRESENTED

Whether the courts below correctly held that they were without jurisdiction to review the grant of a loan by the Rural Electrification Administration in a suit by shareholders of the beneficiary of such loan.

STATEMENT

1. This is the third in a series of actions attempting to enjoin the consummation of a fifty-six million dollar loan from the Rural Electrification Administration (REA) to the Louisiana Electric Cooperative, Inc. (LEC) for the construction of generating and transmission facilities to supply power to LEC's member distribution cooperative. The plaintiffs in this action are members of Dixie Electric Membership Corporation (Dixie), a cooperative engaged in the distribution and sale of electricity which, along with eleven other distribution cooperatives, is a member of LEC. Through a shareholders' derivative action, the plaintiffs seek, insofar as the REA is concerned, to enjoin the consummation of the REA loan to LEC.

a. Much of the background of this action is set forth in the Fifth Circuit's opinion in *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859, certiorari denied, 385 U.S. 815.

On September 12, 1964, the REA approved a loan of $56,521,000 to the Louisiana Electric Cooperative, Inc. This loan was granted under the Rural Electrification Act, 7 U.S.C. 901 *et seq.*, and would enable the LEC to construct facilities for the generation and

transmission of electric power to various member electric cooperatives (including Dixie) which are presently being served by private power companies.

Approximately two weeks after the loan was approved, Central Louisiana Electric Company, a private power company, brought suit to enjoin its consummation, claiming, *inter alia,* that the loan violated the purposes of the Rural Electrification Act; the directives of certain congressional committees; REA Bulletin 111–3; and Central Louisiana's constitutional rights. The district court granted a preliminary injunction and the government appealed.

In the Fifth Circuit, the government's principal contention was that Central Louisiana, and certain other private power companies which had been granted leave to intervene as plaintiffs, lacked standing to maintain the suit. The Fifth Circuit agreed that the private power companies lacked standing and, in addition, held that the loan making authority of the administrator of the REA was not subject to judicial review. This Court denied certiorari (385 U.S. 815).

b. On October 17, 1968, the same private power company, Central Louisiana, filed a second complaint in the district court. *Central Louisiana Electric Co.,* v. *Rural Electrification Administration,* (Civil No. 14,164; W.D. La.). In that complaint, it challenged the same loan on the identical grounds advanced in the first suit and again sought an injunction restraining the consummation of the loan. The district court entered a temporary restraining order.

The government immediately filed a notice of appeal, and, on December 18, 1968, filed in the Fifth Circuit an application for a stay, pending appeal, of the injunction. In the alternative, the government asked the Fifth Circuit to issue a writ of prohibition and/or mandamus against the district court. On December 23, 1968, the Fifth Circuit entered an order stating that the "[g]ranting of a further temporary restraining order by the District Court would, in our view, be improvident * * *." *Central Louisiana Electric Co.* v. *Rural Electrification Administration* (No. 27097; C.A. 5).

c. On December 31, 1968, eight days after the Fifth Circuit entered its order in the second Central Louisiana suit, the present plaintiffs filed the complaint in the instant case again attacking the same REA loan. The plaintiffs allege that they are members of Dixie Electric Membership Corporation, one of the twelve distribution cooperatives that are members of the Louisiana Electric Cooperative. These plaintiffs seek to enjoin the carrying out of the same loan contract between the ~~real United States~~ U.S.A. and LEC. They contend, *inter alia,* that the loan is at variance with the purposes of the Rural Electrification Act, 7 U.S.C. 901, *et seq.,* that the project is economically unfeasible, that the resulting agreements would violate Federal Anti-Trust statutes, that REA has not complied

with its Bulletin No. 111–3, and that the LEC does not possess an allegedly required certificate from state authorities.

2. On January 22, 1969, the district court denied the plaintiffs' motion for a preliminary injunction. The court noted that because the Fifth Circuit had held that the decision of the Administrator is judicially non-reviewable, the plaintiffs could not establish one of the primary prerequisites for a preliminary injunction, *i.e.*, a substantial likelihood of success on the merits. Subsequently the district court granted the government's motion to dismiss the complaint, and entered an order dismissing the action on the alternative grounds of judicial non-reviewability and the plaintiffs' lack of standing to maintain the suit. On November 10, 1969, the Fifth Circuit affirmed.

ARGUMENT

Although the test of standing that the district court applied here was more restrictive than that subsequently announced by this Court in *Association of Data Processing Service Organization, Inc.*, v. *Camp* (No. 85, decided March 3, 1970), we submit that the district court properly dismissed the complaint because (1) petitioners failed to show either that the interest they sought to protect was arguably within the zone of interests protected or regulated by the statute in question or that they had a sufficient legal interest to

entitle them to enjoin the consummation of the loan; and (2) the granting of a loan by the REA is not judicially reviewable.

1. In the *Data Processing* case, the Court held (slip op., pp. 3–4) that the question of standing "concerns * * * whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. * * *" Petitioners, as the power companies before them, cannot meet this test. The provisions of the Rural Electrification Act which petitioners allege were violated by the REA were not intended to protect these petitioners or their interests from the injury they assert will result to them if the loan is fully consummated and the loan proceeds are utilized by LEC to construct and operate the contemplated generation and transmission facilities. Rather, these provisions were enacted for the sole benefit of the United States, their purpose being to safeguard the public interest and, more particularly, to protect the government's security interest.

2. *Data Processing* further held that before persons who are deemed to have standing can prevail on the merits, they must show not only a statutory violation but also that the statute involved gives them "a 'legal interest' which protects them against violations of those Acts" (slip op., p. 7). Petitioners have not shown that the action of the REA about which they complain has invaded any such "legal interest." Nor

have they endeavored to point to any enforceable duty owed by REA to them to refrain from making the allegedly unauthorized loan to the cooperative. A lender's legal obligation to refrain from making an assertedly *ultra vires* loan runs only to the lender's own shareholders. There is no duty to the shareholders of the corporate borrowers which would entitle them to seek relief directly against the lender on the theory that the corporate borrower was somehow injured by accepting and utilizing the loan proceeds.

Nothing in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, is contrary to this position. In *Ashwander*, this Court held that shareholders of a power company had standing to attack a contract for the sale of property to and the purchase of power from the TVA. The Court rested the plaintiffs' standing on the claim that a duty owed to them was being breached by the failure of the power company to resist illegal government demands and coercive interference, the effect of which would be to deprive the company of substantial property and to occasion a loss of business (297 U.S. at 322).

Here, there was no governmental coercion involved in the loan-making process. LEC freely applied for the loan and accepted the loan proceeds upon approval of the application. The conditions imposed on LEC by the REA were not different from those that would be imposed by a private lender in similar circumstances in order to protect his security interest.

3. Quite apart from the question of standing, in *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815, which, as noted above, involved an identical attack on this same loan, the Fifth Circuit held that "Congress has never enacted or intended that loans by this Agency should be reviewable in the courts." 354 F. 2d at 865. There is no occasion for further review of this correct holding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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MAY 19 1970
JOHN A. GIVENS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 1330

OCTOBER TERM, 1969

K. O. SIBLEY, ET AL,

Petitioners

Versus

RURAL ELECTRIFICATION ADMINISTRATION, ET AL,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Brief for the Respondents, Dixie Electric Membership Corporation and Louisiana Electric Cooperative, Inc., in Opposition

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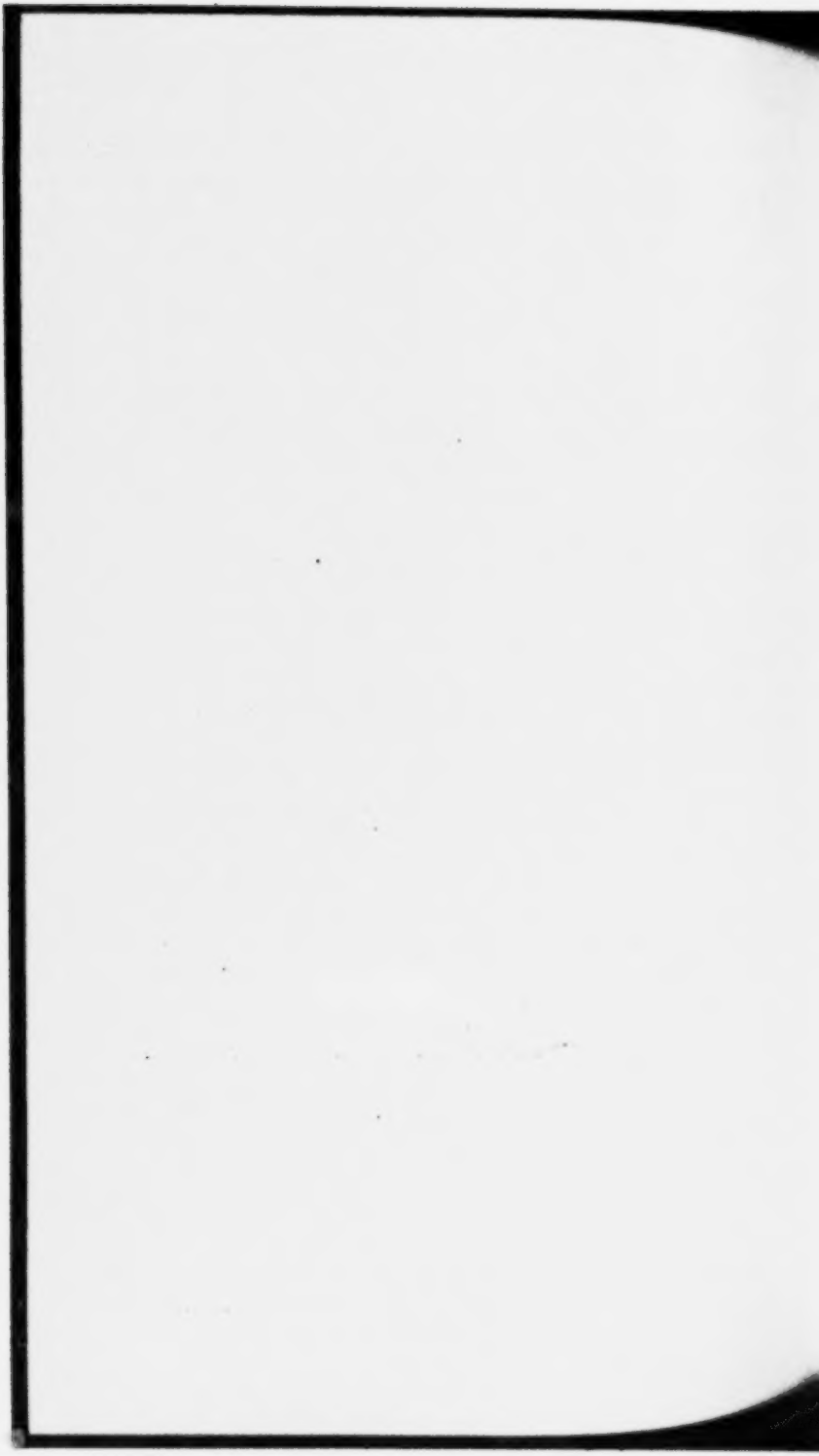

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Brief for the Respondents, Dixie Electric Membership Corporation and Louisiana Electric Cooperative, Inc., in Opposition

---

QUESTIONS PRESENTED

1. Whether petitioners as members of an electric membership cooperative to be served with electric power from another electric membership

cooperative have standing to attack a loan by the Rural Electrification Administration to the latter cooperative to finance the construction of facilities to generate and transmit the electric power.

2. Whether the grant of a loan by the Rural Electrification Administration to an electric membership cooperative is judicially reviewable.

3. Whether petitioners' failure to have complied with the requirement of Rule 23.1, Federal Rules of Civil Procedure, relating to the maintenance of derivative actions, itself justifies dismissal.

STATUTES AND RULES INVOLVED

1. Section 4 of the Rural Electrification Act, 49 Stat. 1365, as amended, 7 U.S.C. 904, provides:

> "Loans by Administrator for electrical plants and transmission lines; preferences; consent of State authorities
>
> The Administrator is authorized and empowered, from the sums herein-

before authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 903(d) and 903(e) of this title but without regard to the 25 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended: Provided, That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, munici-

palities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefore as the Administrator shall determine and may be made payable in whole or in part out of the income: Provided, further, That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: And provided further, That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed."

2. Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 1009(a), provides:

> "Judicial review of agency action.
>
> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion --
>
> Rights of review.
>
> (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

3. Rule 23.1, Federal Rules of Civil Procedure, provides:

> "In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the

action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

4. Louisiana Revised Statutes 12:417, provides:

"Notwithstanding any other provision of this Part, any proposition embodied in a petition signed by not less than ten per centum of the members of a cooperative, together with any document submitted with such petition to give effect to its proposition, shall be submitted to the members of a cooperative, either at a special meeting of the members held within forty-five days

> after the presentation of such petition, or, if the date of the next annual meeting of members falls within ninety days after such presentation or if the petitioner so requests, at such annual meeting. The approval of the board of directors shall not be required in respect of any proposition or document submitted to the members pursuant to this Section and approved by them, but such proposition or document shall be subject to all other applicable provisions of this Part. Any affidavit or affidavits required to be filed with any such document pursuant to applicable provisions of this Part shall, in such cases, be modified to show compliance with the provisions of this section."

STATEMENT

This action is the third in a series of federal court actions which have sought to enjoin consummation of a loan by the Rural Electrification Administration ("REA") to Louisiana Electric Cooperative, Inc. ("LEC"), an electric membership cooperative organized and existing pursuant to the Louisiana Electric Cooperative Act, La. R.S. 12:401 et seq. Petitioners

allege that they are members of Dixie Electric Membership Corporation ("Dixie") (R. 2), which is in turn a member and incorporator of LEC (R. 3), and which is to receive electric power to be generated and transmitted by LEC (R. 5, 6). Petitioners due derivatively to enjoin the REA loan to LEC, entered between REA and LEC on September 12, 1964 (R. 53, 54; see also R. 4) for the purpose of construction by LEC of electric generating and transmission facilities to furnish electric power to its member distribution cooperatives (including Dixie) for resale to the latters' ultimate consumers of electricity (R. 53, 54; see also R. 4-6).

Shortly after approval of the loan, four private power companies operating in Louisiana initiated an action in the United States District Court for the Western District of Louisiana seeking to prohibit its consummation on the grounds that the loan did not accord with the purposes of the Rural Electrification Act;

violated the directives of Congressional committees and the terms of REA Bulletin 111-3; and violated the power companies' constitutional rights.[1] Judge Ben C. Dawkins, Jr., issued a preliminary injunction as sought by the power companies, 236 F. Supp. 271, and the Fifth Circuit Court of Appeals reversed in Rural Electrification Administration v. Central Louisiana Electric Co., Inc., 354 F. 2d 859 (C.A. 5, 1966). This Court denied certiorari, Central Louisiana Electric Company, Inc., et al v. Rural Electrification Administration, et al, 385 U. S. 815; reh. den. 385 U. S. 964.

On October 17, 1968, Central Louisiana Electric Company again filed before the United States District Court for the Western District of Louisiana

[1]The complaint in the 1964 case was filed by Central Louisiana Electric Company; Louisiana Power & Light Company, Gulf States Utilities Company, and Southwestern Electric Power Company intervened in support of it.

an action attacking the loan, and the other three power companies again intervened. The same allegations of illegality were made as in the 1964 case, and the same relief was sought. The 1968 proceeding was assigned Number 14,164 on the Western District Docket and, on December 12, 1968, Judge Ben C. Dawkins, Jr., entered therein a temporary restraining order against consummation of the loan. The government defendants immediately applied to the Fifth Circuit Court of Appeals for a stay pending appeal from the order or, alternatively, for a writ of prohibition and/or mandamus. The proceeding was assigned Number 27,097 on the Court of Appeals' Docket. On December 23, 1968, that court entered its order noting that "Granting of a further temporary restraining order by the District Court would, in our view, be improvident* * * *" See R. 212-214. Eight days later, on December 31, 1968 (R. 19), this action, utilizing the

derivative membership suit to assert the same grounds in opposition to the loan as the private power companies had asserted in their two actions, was filed.[2]

Petitioners' complaint alleges that, because defendants "are committed to the construction of generating and transmission facilities * * * regardless of the costs or inconvenience to your petitioners and others similarly situated * * * any effort by your petitioners do dissuade defendants * * * would be vain, futile, and useless." (R. 13; complaint, paragraph 17 (D)). Their prayer is for an injunction against consummation of the loan and the doing of any acts in furtherance of construction of the generating and transmission project, including "the execution or performance of

[2]Petitioners here add two additional alleged bases of illegality to those involved in the previous suits -- violation of the Federal and State Anti-trust Laws, and disadvantage and damage allegedly resultant to Dixie and LEC from certain contracts between LEC and Dixie and between LEC and others. (R. 12)

any power supply contract or any other agreement or undertaking in connection therewith * * * *" (R. 15).

Following Judge Dawkins' recusal of himself from this action and any further matters in the second private power companies' suit,[3] Judge Edwin F. Hunter granted motions to dismiss filed by the government, Dixie, and LEC (R. 220), and entered his Order of Dismissal (R. 224) grounded on lack of standing in petitioners to maintain the suit, and judicial non-reviewability of the subject-matter.[4]

ARGUMENT

1. Because we submit that it is dispositive, we shall deal first with petitioners' admitted failure

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[3]That action is still pending in the District Court, with no action in its prosecution having been taken since entry of the Court of Appeals' order prohibiting renewal of the temporary restraining order.

[4]In addition to the federal court actions described above, the private power companies, simultaneously

to have:

> "* * * * made any effort to obtain a recision (sic) or modification of the contracts between Dixie Electric, Louisiana Electric and the REA because defendants, Norman M. Clapp and the Boards of Directors of

4 (cont)with initiation of their 1964 federal action, filed a proceeding before the Louisiana Public Service Commission seeking to enjoin construction by LEC of the generating and transmission system unless LEC first secured a certificate of public convenience and necessity from the Commission. The Louisiana Supreme Court held the power companies not entitled to any relief, because of the exemption in Louisiana Revised Statutes 12:426 of electric membership cooperatives from Louisiana Commission jurisdiction. Central Louisiana Electric Company, et al v. Louisiana Public Service Commission, 253 La. 553, 218 So. 2d 592 (1969).

Finally, four members of another electric membership cooperative participating in the LEC project brought a derivative action similar to this one, but in state court. That action was removed to the United States District Court for the Western District of Louisiana, where it bears Number 14,766, under the title J. H. Martin, et al v. Northeast Louisiana Power Cooperative, Inc. The plaintiffs in that action are represented by the law firm which regularly represents Louisiana Power & Light Company, and which has represented it in its various lawsuits seeking to prevent consummation of the loan.

> Dixie Electric and Louisiana Electric, are committed to the construction of generating and transmission facilities * * * regardless of the costs or inconvenience * * * Under these circumstances, any effort to dissuade defendants * * * would be vain, futile and useless." (Complaint, paragraph 18, R. 13).

This allegation falls far short of complying with the clear mandate of Rule 23.1, F.R.C.P. that, in a derivative action:

> "* * * * The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. * * * *" Emphasis added.

Petitioners not only admit their failure to have lodged their grievances with the Boards of Directors of Dixie and LEC, but also fail to deal with the question of utilizing or attempting to utilize the initiative procedures of the Louisiana Electric Cooperative Act contained in La. R. S. 12:417 which make readily

available to aggrieved members recourse, even at a special meeting called therefor, to the entire cooperative membership, in the following terms:

> "* * * * any proposition embodied in a petition signed by not less than ten per centum of the members of the cooperative * * * shall be submitted to the members of a cooperative, either at a special meeting of the members held forty-five days after the presentation of such petition, or, if the date of the next annual meeting of the members falls within ninety days after such presentation or if the petition so requests, at such annual meeting. The approval of the board of directors shall not be required in respect of any proposition * * * *"

Certainly the bare allegation that defendants and the Dixie and LEC Boards of Directors "are committed to the construction of generating and transmission facilities * * * regardless of the costs or inconvenience * * * *" (R. 13) does not "allege with particularity", as required by Rule 23.1, F.R.C.P., the reasons for petitioners' failure to at least approach the Boards of

Directors about their grievances, much less explain their failure to have undertaken the statutorily guaranteed initiative procedure of La. R. S. 12:417. Surely such general allegation will not suffice to maintain such an action as this, instituted just eight days following rebuff of private power companies' judicial efforts to obtain the same result it seeks, and involving one of those companies' attorneys not only as counsel of record, but also another as a party plaintiff herein.[5] As stated by this Court in sustaining a demurrer in United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261 (1917):

> "Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a

[5]The firm of Taylor, Porter, Brooks & Phillips has represented Gulf States Utilities Company in all of its litigation against the loan here in question; additionally, Frank W. Middleton, Jr., one of the petitioners herein, is a member of that firm.

matter of internal management, and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion intra vires the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery. In the instant case there is no allegation that the United Copper Company is in the control of the alleged wrongdoers, or that its directors stand in any relations to them, or that they have been guilty of any misconduct whatsoever. Nor is there even an allegation that their action in refusing to bring such suit is unwise. No application appears to have been made to the stockholders as a body, or indeed to any other stockholders individually; nor does it appear that there was no opportunity to make it, and no special facts are shown which render such application unneccessary. For aught that appears, the course pursued by the directors has the approval of all

> the stockholders except the plaintiffs. The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation." 244 U. S. 263-265; Emphasis added.

As a matter of law, particularly in view of the expeditious procedure provided by La. R. S. 12:417 therefor, it is submitted that petitioners' complaint is fatally defective for non-compliance with Rule 23.1 F.R.C.P. Their complaint attempts to call into question the wisdom and business judgment exercised by the Boards of Directors of Dixie and LEC in entering the contracts and arrangements complained of. A frequently cited statement of the law concerning maintenance of derivative actions is that of Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936):

> "(Stockholders) cannot secure the aid of a court to correct what appear to them to be mistakes of judgment on the part of the officers. * * * This rule

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> applies whether the mistake is due to error of fact or of law, or merely to bad business judgment. * * * *" 56 Sup. Ct. at p. 481.

In Hawes v. Oakland, 104 U. S. 450, the United States Supreme Court affirmed dismissal of a derivative action seeking to enjoin a water company from giving away water, in excess of an amount to which a municipality was legally entitled. The Court stated:

> "The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California, may take this view of it and be content to abide by the action of their directors. If this be so, is a bitter litigation with the City to be conducted by one stockholder for the Corporation and all other stockholders, because the amount of his dividends is diminished?" 104 U. S., at p. 462.

2. Petitioners place strong reliance upon this Court's recent decisions in Association of Data Processing Service Organizations, v. Camp, _____ U. S. _____, 90 S. Ct. 827 (1970) and Barlow v. Collins,

_____ U. S. _____, 90 S. Ct. 832 (1970), in seeking reversal of the lower courts' decisions herein. But in so doing, petitioners misplace their reliance, and overlook a fundamental basis of the actions of the lower courts in this case, that:

> "The effect of our holding in Rural Electrification Administration v. Central Louisiana Electric Co., supra, cannot be so easily circumvented. There the Court specifically held that apart from the plaintiff's lack of standing, the Courts are without jurisdiction to review the Agency's loan-making authority. The holding has been reiterated in Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F. 2d 672 (5th Cir. 1968), certiorari denied 393 U. S. 1000, 89 S. Ct. 488, 21 L. Ed 2d 465." K. O. Sibley, et al v. Rural Electrification Administration, et al, 419 F. 2d 384 (C.A. 5, 1969).

From the foregoing, and especially from the language of the Fifth Circuit in Rural Electrification Administration v. Central Louisiana Electric Co., Inc., supra, in which this Court denied certiorari in a case involving an attack upon the same REA loan here

involved, it is clear that the Court of Appeals decided the issue of judicial reviewability of the grant of an REA loan in accordance with the principle enunciated in Camp, followed in Barlow, that:

> "* * * *There is great contrariety among administrative agencies created by Congress as respects 'the extent to which, and the procedures by which, different measures of control afford judicial review of administrative action.' Stark v. Wickard, 321 U. S. 288, 312, 64 S. Ct. 559, 572, 88 L. Ed. 733 (Justice Frankfurter dissenting). The answer, of course, depends on the particular enactment under which review is sought. It turns on 'the existence of courts and the intent of Congress as deduced from the statutes and precedents.' Id., at 308, 64 S. Ct. at 570." 90 S. Ct., at p. 831.

Unlike the statutory provisions before the Court in Camp and Barlow, those of the Rural Electrification Act, 7 U.S.C. 901 et seq., have been the subject of frequent judicial consideration, and form a substantial body of precedent, beginning with this Court's decision in Alabama Power v. Ickes, 302 U. S. 464, 58 S. Ct.

300, 82 L. Ed. 374 (1938); Kansas City Power & Light Co. v. McKay, 225 F. 2d 924 (D. C. Cir., 1955); Rural Electrification Administration v. Central Louisiana Electric Co., supra; Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F. 2d 672 (C. A. 5, 1968), cert. den, 89 S. Ct. 488; Rural Electrification Administration v. Northern States Power Co., 373 F. 2d 686 (C. A. 8, 1967), cert. den. 387 U. S. 945. The observation of the Fifth Circuit Court of Appeals in Rural Electrification Administration v. Central Louisiana Electric Co., supra, well substantiates the propriety of the dismissal below of this action for lack of judicial reviewability:

> "* * * * we are totally convinced that Congress has never enacted or intended that loans by this Agency should be reviewable in the Courts. The Act itself makes no provision for judicial loan review.* * * *" 354 F. 2d, at p. 865.

And, in Rural Electrification Administration v.

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Northern States Power Co., supra, in which this Court denied certiorari, the following pertinent observation regarding judicial review was set forth:

> "* * * * Congress has steadfastly refused to provide judicial review under 7 U.S.C. Sec. 901 of the REA Act. This silence could be premised on the concern that the private supplier could otherwise interfere with REA loans in each instance where the Administrator finds the public suppliers' proposal unreasonable." 373 F. 2d, at p. 700.[6]

[6]This concern, if felt, as we believe it is, is indeed justified. Since the announcement in 1964 of the loan here attacked, the power companies which have been parties to the various actions brought against it have initiated two suits before the Federal District Court for the Western District of Louisiana (Central Louisiana Electric Company v. Rural Electrification Administration, et al, Number 10,552 - preliminary injunction reversed as above set forth; Central Louisiana Electric Company v. Rural Electrification Administration, et al, Number 14,164 - temporary restraining order ordered not renewed as above set forth), and one before the Louisiana Public Service Commission culminating in the decision of the Louisiana Supreme Court in Central Louisiana Electric Company, et al v. Louisiana Public Service Commission, supra. Additionally, as pointed out above, one of the plaintiffs in the instant suit is

This conclusion is not only warranted, but compelled, by consideration of the history of the REA Act. For example, the original REA legislation in 1936 intended to vest in the Administrator a broad delegation of power as to generating and transmission loans. Throughout the debates on the original REA Act (now over 30 years ago) the bill was attacked on the ground that broad loan discretion would be vested in the Administrator. There were complaints that large expenditures could be made on the authority of one man and that it was unwise to allow REA funds to be used without definite instructions

6 (cont) actually a member of the law firm which regularly represents Gulf States Utilities Company, one of the opposing utility companies; and, in still another action, J. H. Martin, et al v. Northeast Louisiana Power Cooperative, Inc. and Louisiana Electric Cooperative, Inc., Number 14,766 on the Western District Docket, four members of Northeast Louisiana Power Cooperative, Inc., are represented by the law firm which regularly represents Louisiana Power & Light Company, and has represented it in its various lawsuits seeking to prevent consummation of the loan.

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and supervision. It was even charged that such legislation (i.e. that giving such broad loan authority) would tend towards "producing in this country a bureaucratic and socialistic state" (see discussion in 80 Congressional Record 5277-5279). Congressman Rayburn, Chairman of the Interstate and Foreign Commerce Committee, who piloted the House legislation replied to this criticism:

> "The gentleman from Connecticut (Mr. Merritt) remarked about the bill and the great power that was given to the Administrator. Well, the power must be lodged somewhere, and, as far as I am concerned, with a man like Morris Cooke at the head of it, I am satisfied to have the power lodged there." (80 Cong. Rec. p. 5281).

Nor have subsequent efforts to restrict the Administrator's authority over generating and transmission facility loans, by subjecting such loans to outside review, resulted in any such change in the REA statute. Congress has repeatedly rejected

proposals to provide for review of REA loans outside REA, including, inter alia:

(1) Rejection in 1939 of the McGranery bill (H. R. 6292, 76th Congress, 1st Session 84 Congressional Record 5480). This bill would have required a finding of lower power costs to be made by an independent agency of three engineers upon demand of anyone having facilities for supplying such power. The bill never came out of Committee.

(2) Rejection in 1946 of Senator Gurney's proposal requiring certification by the Federal Power Commission "that there is not sufficient electric current available in the area at a reasonable rate" before a loan for generating and transmission facilities could be made. This was rejected on a roll call in the Senate when the REA Deficiency Appropriation for 1946 was considered (21 yeas, 52 nays). See 92 Cong. Record 1799-1817.

(3) In 1962 private power companies proposed an amendment to REA loan procedures which would have read:

> "Provided, that loans for generating capacity shall not be made by the Administrator where there is an adequate supply of electric energy available from investor-owned taxpaying sources at publicly regulated rates and conditions of service, nor shall such loans be made until after due public notice has been given by the Administrator and provision

> made for interested parties to be heard in connection therewith." (See 87th Cong., 1st Sess., Hearings on H. R. 10010, Food and Agriculture Act of 1962, pp. 677-713.

The House Committee did not take favorable action on this proposal. A similar amendment proposed in the Senate by privately-owned power companies was rejected, the Committee stating:

> "The Committee has not recommended inclusion in the bill of the amendment recommended by the investor-owned power companies. As indicated by the above discussion, this is a matter in which the Administrator should be left free to exercise his discretion on the basis of all the diverse facts of each case." (Emphasis supplied) (See Senate Committee Report No. 1787, 87th Cong. 2nd. Sess.; found in U. S. Code Cong. and Adm. News, 1962, Vol. 2, pp. 2662-2693, at p. 2670)

Significantly the same Committee report (at p. 2670) took cognizance of the fact that the existence of a situation in which the private power companies use their position to restrict the REA borrowers to the most unprofitable customers (i.e. the territorial integrity concept) is a proper consideration for the Administrator to apply in granting a generating facility loan. The Committee stated:

"Correspondingly, to the extent that investor-owned companies will serve REA borrowers only on conditions which are not fair and reasonable, or which restrict the REA borrowers to the most unprofitable customers, the need for loans to construct generating facilities is increased."[7] (Emphasis supplied)

[7]U. S. Code and Adm. News, 1962, Vol. 2, at p. 2670. It is to be noted that, in addition to power cost savings, the loan here involved was made "to end or lessen the dependence of the Member Cooperatives for wholesale power upon commercial power companies which were using their position as wholesale suppliers to the Member Cooperatives to extend retail services to the consumers and potential consumers of the Member Cooperatives and otherwise encroach upon their service areas, thereby posing a threat to the security interests of United States related to approximately $86,000,000.00 of REA loans to the Member Cooperatives and threatening also the continuance or improvement in the costs of electric service to many thousands of rural consumers in Louisiana." Affidavit of Norman Clapp, REA Administrator; R. 54. The method of encroachment and nature of the threat are illustrated by the following: "* * * * Throughout its service area, Dixie has, particularly within approximately the past ten years, suffered serious encroachments upon and into its service area by competing commercial power companies, and particularly Gulf States Utilities Company, Dixie's chief supplier of wholesale power. A common method of encroachment has involved the power companies' 'underbuilding' transmission lines constructed to furnish power to

(4) Proposal has been made in the Congress to amend the REA Act to provide for judicial review of REA loans. Hearings were held in May, 1965, by the sub-committee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1336, 89th Congress 1st Sess. In such hearings the proposal has been opposed by the National Rural Electric Cooperative Association. No action was taken on the proposal.

In sum, then, we reiterate that the legislative history recounted above amply substantiates the body of jurisprudence which has developed the principle that the grant of REA loans is not judicially reviewable. There is no conflict between this Court's analysis in Camp and Barlow of judicial reviewability and that accorded the question in the jurisprudence which has developed concerning reviewability of loans granted

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7(cont) Dixie's metering points, at which Dixie receives the power for distribution; by underbuilding distribution lines beneath the transmission lines required to be built to serve Dixie, the power companies have utilized the transmission facilities to seriously encroach upon Dixie's service area. * * * *" Affidavit T. Scott McVea, President of Dixie Electric Membership Corporation; R. 70.

pursuant to the REA Act, that "The statute not only fails to provide for judicial review, but when construed in the light of its purpose and of legislative history, the statute retains oversight of the Administrator's actions in the hands of Congress itself and precludes judicial review." Alabama Power Company v. Alabama Electric Cooperative, Inc., supra, at p. 675.

> 3. "Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies'. As we recently stated in Flast v. Cohen, 392 U.S. 83, 101, 88 S. Ct. 1942, 1953, 20 L. Ed 2d 947 '* * * /I/n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" Association of Data Processing Service Org., Inc. v.

Camp, _____U.S. _____, 90 S. Ct., at p. 829 (1970).

"* * * * The question of standing * * * concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." id, at 90 S. Ct., p. 830.

So spoke this Court regarding, apart from the reviewability question, the matter of standing, in its recently decided Association of Data Processing Service Org., Inc. v. Camp, supra. In view of the line of decisions of this Court and lower federal courts analyzing the Rural Electrification Act, and uniformly concluding that private utilities do not have standing as competitors of REA loan beneficiaries, such as Dixie and LEC, to challenge REA loans to such beneficiaries, the salient question concerning standing presented by this case is whether, by the simple expedient of presenting in a members' derivative suit the various charges of

illegality historically leveled against REA loans by competing private utilities, standing to challenge such loans can be achieved, particularly in the context of this action, in which the challenge is brought by the attorneys for one of the same private utilities to which standing to challenge the same loan was denied in Rural Electrification Administration v. Central Louisiana Electric Co., Inc., supra. Upon analysis, the only interests which petitioners purport to advance by this action are protection against "higher electric rates" (complaint, paragraph 18; R. 13) as consumers of electricity, and against the possibility that Dixie and LEC would be subjected to penalties under the Anti-Trust Laws as a result of the contractural arrangements between them. No other allegation of their complaint asserts any injury whatsoever to petitioners, either individually or derivatively.

With regard to the first respect in which

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petitioners' complaint purports to set forth an interest - that in protection against higher electric rates - it is entirely clear upon consideration of the provisions of the Rural Electrification Act upon which petitioners attempt to ground their action, 7 U.S.C. 904, that its purpose in authorizing the approval by the Rural Electrification Administration of generating and transmission loans is simply to permit the financing of generating and transmission systems upon reasonably adequate security for the United States. The provisions of 7 U.S.C. 904 do not even arguably place within the ambit of the statute's purpose an interest of those who will receive electric service as a result of the loan in having such service at any given ultimate level of rates - whether higher, lower, or the same as potential alternate sources. In view of the myriad interests of the United States to be served by the grant of such a loan (here, for example, protection of the government's

security interest in an $86,000,000.00 investment in rural cooperative distribution lines in Louisiana, against encroachment through "underbuilding" by private utilities on the service area of such cooperatives, R. 59, 69, 70), it certainly cannot be gainsaid that the statute was intended to accord to anyone standing to judicially review ultimate rate levels. To so hold would here imperil the security interests of the United States in millions of dollars in loans made to extend the benefits of electric service to thousands of persons to whom it has not otherwise been available, and would defeat rather than serve the Congressional purpose in enacting rural electrification legislation; to so hold would permit judicial challenge of each and every REA loan to the many electric and telephone systems financed thereby across the land, on the mere allegation of a customer or member that the loan would increase his service rates. Such a result

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could only be countenanced if the statutory scheme under consideration intimated a purpose to assure a given level of rates to customers or members, thereby bringing that "within the zone of interests to be protected or regulated by the statute * * * *", Association of Data Processing Service Org., Inc. v. Camp, supra, 90 S. Ct., at p. 829. But here, the statute not only fails to so intimate, but, moreover, when taken in light of the legislative history referred to above and expressly noted by the courts, it clearly negates such a reading. And, aside from an interest in a given level of rates, the only other respect in which petitioners attempt to assert an interest which could arguably give them standing - allegations of Anti-Trust violations in the contracts between LEC and Dixie - a complete answer is furnished by Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F. 2d 672 (C.A. 5, 1968), in which this Court denied certiorari, 393 U. S. 1000.

Nor does Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936), upon which petitioners rely, demonstrate in any way that they have standing here to enjoin the grant of an REA loan. We have here no allegation of breach of trust or duty on the part of the Boards of Directors of LEC or Dixie, of the nature of "* * * * yielding, without appropriate resistence, to governmental demands which are without warrant of law or are in violation of constitutional restrictions * * * *" nor "* * * *failure to assert the rights and franchises of the corporation against an unwarranted interference through legislative or administrative action." Id, at p. 319. Applying the standing analysis laid down by this Court in Camp, complainants in Ashwander clearly alleged themselves to have had a substantial ownership interest arguably protected by the constitutional limitations allegedly exceeded by the TVA legislation pursuant to which their corporation had contracted. Differently, as we have above

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demonstrated, petitioners in this case have not alleged any interest which, upon analysis of the applicable statutory provisions, grants them the standing requisite to maintenance of this action.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I, Paul M. Hebert, one of the attorneys for respondents Dixie Electric Membership Corporation and Louisiana Electric Cooperative, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of _____, 1970, I served copies of this Brief in Opposition to the Petition for Certiorari on the petitioners and all other parties of record to this proceeding, by depositing the same in the United States Post Office, with airmail postage prepaid, addressed to the following parties:

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